ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Discussion ACT Justice and Community Safety Directorate
Via macr@act.gov.au

5 August 2021

Submission to ACT Government consultation on raising the minimum age of criminal responsibility

Thank you for the opportunity to make a submission to the above consultation.

The enclosed submission is made on a whole-of-Commission basis and reflects the unanimous position of the ACT Human Rights Commission. Our submission should not be considered confidential; please be aware that we intend to make this feedback publicly available on our website at the time that it is provided to government.

Yours sincerely




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About the ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:

- The President and Human Rights Commissioner
- The Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner
- The Public Advocate and Children and Young People Commissioner (PACYPC); and
- The Victims of Crime Commissioner (VOCC)

Until 6 April 2000, the minimum age of criminal responsibility (MACR) in the ACT was 8 years of age.[1] Section 25 of the *Criminal Code Act 2002* (ACT) (the Code) currently fixes the ACT's MACR at 10 years of age; in stark contrast to the worldwide median MACR of 14.[2] Section 26 of the Code presently reflects the common law presumption of *doli incapax*; that is, that the prosecution must establish, as a question of fact, that a child aged 10 years or older, but not yet 14, knew that their behaviour was seriously wrong before they may be held criminally responsible for that behaviour.

The Commission has, since 2005,[3] advocated for the MACR in the ACT to be further increased. In 2005, the Human Rights Commissioner audited the former Quamby Youth Justice Centre and recommended that the MACR be reviewed and raised to 12 years of age.[4] The Commission reiterated this view in July 2011 in its inquiry into the ACT Youth Justice System, including the Bimberi Youth Justice Centre,[5] and, recently, for the Australian Human Rights Commission's *Children's Rights Report 2019*.[6]

Raising the MACR in the ACT has, since 2019, been one of the Commission's key strategic priorities. On 21 November 2019, the Commission hosted a preview public screening of the documentary *In my blood it runs*. This was followed by a #Raisetheage forum on International Human Rights Day, 10 December 2019. In February 2020, the Commission made a submission to the Council of Attorneys-General's Age of Criminal Responsibility Working Group Review.[7] In May 2021, we joined with 76 other organisations as part of the national #RaiseTheAge campaign to call on all levels of Australian Government to raise the MACR as a matter of urgency.[8]

Increasing the MACR in the ACT is of shared interest to all Commissioners, with each observing different implications for their respective roles and functions under the HRC Act. The human rights implications of setting an appropriate MACR are relevant to both the ***President and Human Rights Commissioner's*** legal policy advisory and community education functions, and to the ***DHSDCS Commissioner's*** handling of complaints about services for children and young people, including Bimberi Youth Justice Centre, and complaints about alleged unlawful discrimination.

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[1] *Children's Services Amendment Act 2000,* <https://www.legislation.act.gov.au/a/2000-10/>

[2] UNICEF, *Age Matters! Exploring age-related legislation affecting children, adolescents and youth* (Youth Policy Working Paper No 4, November 2016) 4.

[3] Then known as the ACT Human Rights Office.

[4] ACT Human Rights and Discrimination Commissioner, *Human Rights Audit of Quamby Youth Detention Centre* (Audit, 30 June 2005).

[5] ACT Human Rights Commission, 'The ACT Youth Justice System 2011: A report to the ACT Legislative Assembly by the ACT Human Rights Commission' (Report, 28 July 2011) 237.

[6] ACT Human Rights Commission, Submission No 97 to Australian Human Rights Commission, *Children's Rights Report 2019* (28 October 2019), 8.

[7] ACT Human Rights Commission, Submission to Council of Attorneys-General review of age of criminal responsibility (28 February 2020).

[8] #RaiseTheAge, 'Statement to the Council of Attorneys-General on raising the age' (19 May 2021).

The MACR is also directly relevant to the ***PACYPC's*** jurisdiction, which includes oversight of the Bimberi Youth Justice Centre, monitoring services for the protection of children and young people as well as advocating for the rights and interests of children and young people (including those with disability) in ways that promote their protection from abuse and exploitation. The PACYPC is also responsible for consulting with children and young people in the ACT in ways that promote their participation in decision-making.

The **VOCC** is responsible for consulting on, and promoting reforms, that meet the interests of victims. Raising the MACR will necessarily have implications for the rights and interests of victims who have been harmed by the conduct of a child or young person. Likely impacts include consideration of victim rights to therapeutic services and financial assistance, along with rights to respectful treatment, recognition, information, consultation and participation, as enshrined in the charter of rights for victims of crime.

The Commission commends the ACT Government for prioritising reform to increase the MACR in the ACT alongside commensurate investment in accompanying service responses to children who engage in harmful behaviours. In view of the ACT Government's commitment to raise the MACR, our submission largely avoids restating those arguments about raising the MACR to 14 years of age or higher that we articulated in our earlier submission to the Council of Attorneys-General in February 2020. For further discussion of these arguments, including the medical and developmental evidence about a child's developing capacity, cohort numbers in the ACT and broad human rights implications underpinning these proposed reforms, we refer to our earlier submission.[9] This submission instead outlines the Commission's views on implementing a revised MACR in the ACT, as guided by the Discussion Questions.

Throughout this submission, the term 'younger children' should be taken as referring to children aged 10 to 13 years. Although mindful that the ACT Government is yet to settle an alternative service response for children and young people under the revised MACR who engage in harmful behaviours, the Discussion Paper indicates, at page 21, that preliminary consultations have identified a multidisciplinary panel model as a potential component. This submission alludes to this alternative response, in whatever form it takes, as a 'therapeutic panel model'.

Finally, the Commission acknowledges that developing the surrounding legislative, policy and regulatory framework around an increased MACR will necessarily proceed in further stages. The Commission would be pleased to participate in further consultation and discussion at any stage as this important work progresses.

Section One: Threshold issues for raising the MACR

1. Should there be exceptions to an increased MACR for children and young people that engage in very serious and/or repeated harmful behaviours? If yes, what offences should be captured?

1.1. The Commission calls on the ACT to raise the MACR to at least 14 years of age, in all circumstances and without exceptions for serious and/or repeated harmful behaviours. Excepting specified offences or recurrent offending from an increased MACR is irreconcilable with the underlying rationale and stated evidence base for increasing the MACR and so would, in our view, be incompatible with rights protected by the *Human Rights Act 2004* (HR Act).

1.2. In reaching this position in respect of exceptions, the Commission has been informed by statements of the UN Committee on the Rights of the Child, and views of Australian peak bodies, including the Law Council of Australia, the Royal Australasian College of Physicians and the Australian Medical

[9] Above 7.

Association.[10] These bodies each reiterate research on brain development that indicates children at 10 years of age do not have sufficient decision-making ability to form the requisite intent to be held criminally responsible.[11]

1.3. We also acknowledge and take seriously the prevalence of views within the community, including those expressing concern about children who engage in serious or repeated harmful behaviours. In this regard, we recognise and have closely considered calls for criminal justice responses that reflect the gravity and impact of a child's conduct as well as the accountability of the individual child.

1.4. As the discussion paper alludes, the prevailing medical consensus indicates that children under the age of 14 *may* not have the required capacity to be found criminally responsible.[12] We realise that members of the community who have experienced harmful behaviour also raise valid concerns about setting a fixed age at which all children are deemed incapable of criminal responsibility, regardless of their individual capacities or antecedents (as elaborated in Discussion Question #2).

1.5. Incarceration has not been shown to deter future offending by children aged 10 to 13.[13] Indeed, studies have shown that the younger a child is at the date of their first interaction with the justice system, the higher their rate of recidivism.[14] Prescribing offence-based exceptions to the MACR cannot therefore rationally yield a deterrent effect or greater protection of the community from youth offending. In rare situations where younger children do engage in serious harmful behaviours, those behaviours are more likely to be symptomatic of a systemic failure to address their developmental needs and, often, their own experiences of victimisation.[15]

1.6. In addition, the prevailing neuroscientific consensus as to the still-limited ability of children to understand and discern right and wrong (especially in emotional circumstances, peer settings or where overlaid by complex needs) does not distinguish between specific offences. In this regard, the High Court of Australia has affirmed that serious or repeated harmful behaviours cannot, in themselves, demonstrate the requisite capacity of a child to be found criminally liable.[16]

1.7. Given these considerations, responses framed as 'juvenile justice' are, in the Commission's view, ill-equipped to meaningfully address the underlying causes of offending by children and are in fact likely to be counter-intuitive to their stated aims: rehabilitation, accountability and protection of the community. Raising the MACR uniformly, without exceptions for serious or repeated harmful

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[10] UNCRC, General Comment 24: Children's rights in the child justice system ('General Comment 24'), UN Doc CRC/C/GC/24 (18 September 2019); Law Council of Australia, Submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review (2 March 2020); Royal Australasian College of Physicians, Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility (29 July 2019); Australian Medical Association, Submission to the Council of Attorneys-General – Age of Criminal Responsibility Working Group Review (13 February 2020).

[11] See, for example, Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives' (2011) 6(2) *Journal of Children's Services*, 86, 87.

[12] Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing Sentencing Advisory Council, Sentencing Children and Young People in Victoria (2012) 11; Thomas Crofts, 'A Brighter Tomorrow: Raise the Age of Criminal Responsibility' (2015) 27(1) *Current Issues in Criminal Justice* 123; Enys Delmage, 'The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective' (2013) 13(2) *Youth Justice* 102.

[13] Andrew McGrath & Don Weatherburn, 'The effect of custodial penalties on juvenile reoffending' (2012) 45(1) *Australian & New Zealand Journal of Criminology*, 26.

[14] Sentencing Advisory Council, 'Reoffending by Children and Young People in Victoria', (December 2016), 26.

[15] Kelly Richards, 'Juveniles' contact with the criminal justice system in Australia' (Monitoring Report No 07, Australian Institute of Criminology, Canberra, 2009) <https://www.aic.gov.au/publications/mr/mr7>

[16] *RP v The Queen* [2016] HCA 53, [9].

behaviours, must not, however, mean that younger children are not held accountable for such behaviours.

1.8. While a juvenile justice response cannot, in our view, offer a suitable mechanism for responding to harmful behaviours engaged in by children, there must still be a graduated and tailored civil response that addresses the therapeutic needs of the child, recognises the consequences of their behaviour and ensures the safety of the community, including affected persons. It is hence fundamental that meaningful and effective service responses are developed and amply resourced to ensure the successful implementation of an increased MACR in the ACT.

2. Should doli incapax have any role if the MACR is raised?

2.1. The Commission would not anticipate a continuing need for the common law presumption of *doli incapax* nor its statutory reflection in s 26 of the Code to be retained should the MACR be increased uniformly to 14 years of age.

2.2. Requiring the prosecution prove that an individual child understood that an act was seriously wrong by adult standards, may appear preferable in theory to raising the MACR. We accordingly acknowledge that there is no uniform rate at which children mature nor a single age at which a child can be said to have reached their physical and mental maturity; an accused child who is younger than 14 years of age may have capacity to understand that their acts were seriously wrong whereas others of that age (or older) may not.[17]

2.3. The statutory presumption of *doli incapax* is therefore intended to operate as a flexible means of applying criminal justice responses based on a child's individual capacity to appreciate the moral status of their acts, in accordance with the presumption of innocence and in recognition of the special vulnerability of children.[18] The common law presumption requires the prosecution to adduce evidence that infers beyond a reasonable doubt that the relevant child knew their act was seriously wrong, as opposed to 'naughty' or 'mischievous'.[19] The prosecution must establish this knowledge separately and in addition to the requisite elements of the offence (ie the child's act and intention).

2.4. As outlined in our submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group in February 2020, however, the practical operation of *doli incapax* is often afflicted by procedural and substantive inconsistencies, both between and within jurisdictions.[20] In this regard, its inherent complexity has been criticised as leading to inconsistent outcomes and delays that further entrench remanded children into patterns of lifelong interaction with the criminal justice system.[21] For example, because evidence of the child having engaged in the act constituting the offence cannot itself be relied on to establish this knowledge,[22] *doli incapax* will generally require that prosecutors obtain expert evidence from paediatric psychiatrists and development psychologists, whose limited availability in a small jurisdiction may delay or extend proceedings and a child's time on remand.

2.5. The ACT Supreme Court recently observed misapprehension affecting the presumption of *doli incapax* and its codification in the ACT in *Williams v IM* [2019] ACTSC 234. These proceedings centred on

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[17] *RP v The Queen* [2016] HCA 53, [12].
[18] Reflected in the ACT in the *Human Rights Act 2004*, ss 11, 20(2), 22(1) and 22(3).
[19] *RP v The Queen* [2016] HCA 53, [38]; *C v DPP* (1995) 2 All ER 43.
[20] ACT Human Rights Commission, Submission to Council of Attorneys-General review of age of criminal responsibility (28 February 2020).
[21] Australian Medical Association, 'AMA Calls for Age of Criminal Responsibility to be Raised to 14 Years of Age' (Media Release, 25 March 2019).
[22] *RP v The Queen* [2016] HCA 53, [9]; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38.

whether a Magistrate had erred in requiring the prosecution to establish *doli capax* beyond reasonable doubt in circumstances where the relevant child had already plead guilty to the charges at issue. The Court found that, although the common law presumption automatically requires the prosecution establish *doli incapax*,[23] in the ACT an accused child must first point to evidence suggesting a reasonable possibility that they did not have the requisite legal capacity before the presumption will apply.[24]

2.6. There is, consequently, a disparity in the operation of the statutory presumption in the ACT and other jurisdictions (including neighbouring non-Code jurisdictions, New South Wales and Victoria) where the prosecution is automatically required to rebut the presumption. In some circumstances, an accused child may also then be required to bear the costs of obtaining psychological assessments and related reports in order to activate the rebuttable presumption.

2.7. Yet, even where an accused child successfully raises the presumption and is not shown by the prosecution to be *doli capax*, research has shown that a child's exposure to criminal justice processes, including any length of detention on remand, compounds their propensity to further offending.[25] Prolonged exposure to such criminogenic influences is of greater concern for younger children in youth detention facilities where developmental immaturity, often combined with other vulnerabilities, like trauma history, disability and other complex needs, renders them more susceptible to negative peer influence and initiation into new criminal networks, strategies and skills.[26] To assess *doli incapax* after a child has been remanded has therefore been criticised as largely counterintuitive to its protective intent.[27]

2.8. These considerations together broach whether the practical value of *doli incapax,* as it has been reflected in ACT law, provides a sufficient safeguard for the rights of children and others. In conjunction with detention on remand, individually examining an accused child's capacity may instead be counterintuitive to their rehabilitation and, more broadly, safety of the community.[28] Should the continued operation of *doli incapax* under the Code be further contemplated under an increased MACR, the government may wish to review its operation to ensure the presumption currently ensures sufficient protection for the rights of accused children.

Section Two: An alternative model to the youth justice system

3. Are these the appropriate principles to underpin the development of an alternative model to a youth justice response? Are there alternatives or other principles that should be included?

3.1. The Commission welcomes the development of key principles that will guide the development of legislation to establish a revised MACR, as well as supporting policies and procedures. It is essential from a human rights perspective that any new therapeutic approach is sufficiently transparent, consistent and accessible, for the benefit of participating children and their families, for affected people and for government agencies and service providers alike. It follows, in our view, that this new model must be established in statute and supplemented by subordinate law, rather than administered

[23] *RP v The Queen* [2016] HCA 53, [32].
[24] *Williams v IM* [2019] ACTSC 234, [46]; see *Criminal Code 2002*, s 58(2).
[25] Kelly Richards, 'What makes juvenile offenders different from adult offenders?' ('Richards 2011') (Australian Institute of Criminology, Trends & issues in crime and criminal justice No 409, February 2011) 6.
[26] Ibid 7.
[27] Kate Fitzgibbon and Wendy O'Brien 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 26.
[28] Thomas Crofts, 'Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*' (2018) 40 *Sydney Law Review* 339, 341.

solely by policy and guidelines alone. Implementing legislation should include, for example, the establishment of relevant bodies, terms of appointment, necessary powers, obligations and thresholds, decision-making processes and availability of review and authorised disclosures of information (discussed further at Discussion Question #18).

3.2. The Commission does not support, in such terms, the development of an '*alternative model to a youth justice response*'; that is, action that is only triggered after harmful behaviours, which are currently deemed 'criminal', occur. Rather, the Commission supports an integrated, early intervention, diversionary approach that aims to change the life trajectory of children and young people at risk. Children and young people must be referred at the earliest opportunity based on assessment of risk of harm to others, the community and themselves.

3.3. Where harmful behaviours do occur, the new approach must ensure that the underlying therapeutic needs of the child are met, while maintaining the rights of victims and protecting community safety. The Commission considers that several principles in the discussion paper will need to be refined, and further principles included, to address these interrelated priorities. To this end, we also encourage government to explicitly locate any new therapeutic model within a human rights framework. Importantly, any new model must take account of article 3 of the United Nations Convention on the Rights of the Child, which provides that in all actions concerning children the best interests of the child must be a primary consideration.[29] Our suggested refinements are as follows:

- *Principle 4:* While the Commission supports Principles 1-3 and 5 as they are presently framed, we consider that Principle 4 requires amendment. The Commission supports a principle acknowledging that each child and young person has unique needs, and that children and young people are generally best supported within the network of relationships in which they live. Services involving whole families are essential to keeping children out of youth justice, and out of care and protection and homelessness, which are themselves risk factors for contact with youth justice.[30] However, Principle 4 as currently drafted omits the provision of any direct support to children and young people themselves. This is a critical oversight.

  Further, the particular emphasis in Principle 4 on schools and health services is concerning. While health and education are of course essential as universal service providers having key interactions with children and young people under the MACR, this historic reform necessitates a whole-of-government response, and responsibility among a broader range of directorates and services. At minimum, housing, transport and city services, justice (beyond the criminal sphere), migrant and refugee services, and sport and recreation will all have important roles to play. Accordingly, the Commission recommends that Principle 4 be modified as follows:

  > *'ensure the safety and wellbeing of children and young people by supporting them, their families and communities'*

- *Principle 6* requires amendment to unlink 'restorative and culturally appropriate' practices. Both elements are essential in their own right, though should not be conflated and are not always interlinked. Given the inequitable rate of detention of Aboriginal and Torres Strait Islander children and key relevance of this reform to Aboriginal families and community, the Commission favours

[29] Convention on the Rights of the Child, opened for signature 20 November 1989 UNTS No 1577 (entered into force 2 September 1990), art 3.

[30] Catia Malvaso, Delfabbro, Paul Defabrro & Andrew Day, 'The child protection and juvenile justice nexus in Australia: A longitudinal examination of the relationship between maltreatment and offending' (2017) 64 *Child Abuse & Neglect* 32-46; Australian Institute of Health and Welfare, 'Young people in child protection and under youth justice supervision 2014–15', (Data linkage series No. 22, Canberra, 2016).

focussing a principle specifically on culturally appropriate practices. Recognising both the rights of victims and the importance of accountability for harmful behaviours, we consider that another separate principle, focussed specifically on restorative practices, should also be added, as suggested below.

- *Principle 7* raises serious concerns for the Commission regarding its current framing, which contemplates mandating support as a response of last resort. Our reasons for concern are elaborated in our answers to Discussion Questions #8 and #9 below. The Commission recommends that the principle be deleted or otherwise substantially revised as follows:

  'recognise that the mutual obligation established by mandated support may be necessary to meet the best interests of the child or young person, their family and community'

3.4. We further recommend adopting the following additional principles for this historic reform:

- **Early intervention and diversion** that aims to prevent children and young people reaching the point that harmful behaviours occur and responding appropriately in those instances where harmful behaviours nevertheless eventuate.

- **Child-centred** ensuring that all processes and procedures are designed with the child at the centre, so as to be accessible, understandable and relevant to children and young people.

- **Restorative** ensuring that the rights of victims are maintained, and that accountability for harmful behaviour is integral to the new approach. A broader range of restorative practices must be able to be incorporated flexibly to maximise therapeutic and diversionary benefit to the child or young person; opportunities for victim participation and recognition of harm caused, and long-term safety of the community.

- **Meet diverse needs**. While currently 'culturally appropriate' is mentioned as one aspect of one principle, the principles collectively do not reflect an essential responsiveness to diversity and inclusion. The new approach will need to meet the specific needs of individuals and families with a range of diverse and complex, intersecting needs, not only cultural diversity. Examples include disability, developmental stage, communication ability, gender, care experiences, intergenerational trauma, and socio-economic disadvantage.

- **Trauma informed**. Recognising that harmful behaviours among young people aged 10-13 years almost invariably have their roots in trauma and complex needs, all supports and processes in the new approach must be trauma informed.[31] Trauma informed approaches are also essential in supporting victims of harmful behaviours.

- **Adequately funded**. Any alternative model for the ACT will fail to divert young people from a criminal justice pathway without an injection of funding into fundamental support services. Funding must extend to not only a bespoke new arrangement for identification and coordination of support for children under the MACR, such as a therapeutic assessment panel, but also to community-based, wraparound support services.

[31] Haley Zettler, 'Much to do about trauma: A systematic review of existing trauma-informed treatments on youth violence and recidivism' (2021) 19(1) *Youth Violence and Juvenile Justice*, 113-134; Leanne Dowse, Therese Cumming, Iva Strnadova, Jung Sook-Lee and Julian Trofimovs, 'Young People with Complex Needs in the Criminal Justice System' (2014) 1(2) *Research and Practice in Intellectual and Developmental Disabilities, 174-185.*

4. What universal or secondary services should be introduced and what existing services should be expanded – or alternatively are there any services that could be re-oriented or repurposed - to better support this cohort?

4.1. The Commission emphasises the need to provide allocated funding for evidence-based approaches, recognising the comprehensive evidence for early intervention and prevention, as this will meet the needs of children and young people while also prioritising the safety of the community and victims. The Commission refers to its previous advocacy for specific examples of evidence-based therapeutic services in this and other jurisdictions.[32] Further, the Commission is aware of the independent review being conducted by Emeritus Professor Morag McArthur et al and has been briefed on progress and preliminary findings. The Commission notes and supports the solid evidence base for multidisciplinary, wraparound service approaches that are responsive to complex need.

4.2. The example of a multidisciplinary panel (Discussion Paper, p. 21) is a helpful example of one of the new elements that will be required to support raising the MACR in the ACT. The Commission notes that the PACYPC recommended a panel model to the Human Services Cluster Inter-Directorate Committee two years ago for children and young people with the most complex needs, although this was not progressed during the Ninth Legislative Assembly. The Commission agrees that a multidisciplinary therapeutic panel should form a key part of the administrative architecture supporting an increased MACR.

4.3. This therapeutic panel model must be central to a new early intervention approach, with children, young people and their families referred to the panel at the earliest opportunity and based on assessment of risk to themselves and community. As noted above in response to Discussion Question #3, the Commission would not endorse a model in which the panel becomes the substitute gatekeeper to services only *after* harmful behaviour, which would presently be deemed criminal, occurs. Rather the Commission supports an integrated, early intervention, diversionary approach which aims to change the life trajectory of children and young people at risk.

4.4. As noted, the Commission has been briefed on the independent review being conducted by Emeritus Professor Morag McArthur et al. The Commission broadly supports the proposal for a new multidisciplinary panel and wraparound therapeutic service model, subject to:

a. adequate statutory authority to ensure independence and decision-making authority, to compel information, and to mandate service provision and engagement

b. a mandatory requirement that the panel include Aboriginal and Torres Strait Islander persons when engaging with an Aboriginal or Torres Strait Islander child or young person

c. increased funding for community-based support and therapeutic services

d. referral at the earliest possible stage of risk identification, and not only when behaviours which would currently be criminal have occurred

e. a therapeutic first approach which is child-centric, with support scaffolded around the young person's needs and the protection of others

f. inclusion of a range of restorative practices when a child or young person's behaviour has already harmed others, to uphold the rights of victims and promote accountability

[32] ACT Human Rights Commission, Submission to Council of Attorneys-General review of age of criminal responsibility (28 February 2020), 13-17.

g. funding discretion to create tailored and bespoke service support packages for individual children and young people

h. a 'whatever it takes for as long as it takes' response per child/young person, recognising that high costs for early intervention are unlikely ever to equate to the current whole-of-life costs of failing to change a young person's criminal trajectory. Currently, detention of young people in Bimberi costs the ACT on average $3,464 per young person per day.[33] This is without the costs of harm to victims and community, and the lifetime costs of recidivism

i. the ability to purchase services from other jurisdictions given workforce and skills shortages in the ACT (including as exacerbated by the ongoing public health emergency), particularly to meet the needs of children and young people with the most complex behaviours

j. fidelity to the recommended model, including not exceeding recommended capacity and caseload limits without further resourcing; and

k. resources to ensure no waitlist for assessment and response by the panel, including capacity for immediate response in situations of crisis or serious harmful behaviour.

4.5. The success of the panel will depend upon the existence and availability of community-based services. The discussion paper states, at page 21, that "[b]y intervening early, the Panel could provide appropriate services and supports to children and young people that respond to the underlying causes of harmful behaviour." It is very unlikely that the panel itself would provide services directly to children and young people. Rather, the panel will be the assessment, coordination and communication pathway for securing and maintaining services from within government and community. Notwithstanding this focus, a child or young person should also be invited to participate in panel discussions when considered therapeutically beneficial, as reinforced by Article 12 of the Convention on the Rights of the Child.[34]

4.6. Detailed consideration will need to be given to not only the funding of the panel, but to securing service provision from provider organisations both within government and non-government sectors. The Commission supports a statutory requirement for service provision in response to panel recommendations (see also our answer to Discussion Question #8). Currently, contractually based arrangements and service agreements lead to gaps in care for children in the ACT, with no agency responsible for aspects of their therapy, for planning and transferal of paperwork, for example. In the Commission's experience, service coordination for children and families is stronger where there is one designated lead agency with decision making authority. If the new panel is to take this lead role, its decision-making authority will need to be clearly articulated in legislation and it will need to be adequately funded to have a direct, hands-on role in ensuring that service commitments are implemented.

4.7. Based on the Commission's experience working with, and awareness of current children and young people with complex and challenging behaviours, we see a critical shortfall, and in some cases absence of, services in the following areas to support this historic reform:

- youth homelessness and housing, including crisis, short-term and long-term accommodation
- child and adolescent complex trauma services
- child and adolescent mental health services

[33] Productivity Commission, Report on Government Services 2021 (20 January 2021), Part F, Section 17, Table 17A.20.
[34] Convention on the Rights of the Child, opened for signature 20 November 1989 UNTS No 1577 (entered into force 2 September 1990), art 12.

- Aboriginal and Torres Strait Islander run services for Aboriginal and Torres Strait Islander children, young people and families
- therapeutic out-of-home care, particularly residential care
- services for children and young people with co-morbidity, such as drug and alcohol issues and mental illness
- services for children and young people with disability and other needs, such as complex trauma or mental illness
- youth engagement within ACT policing
- alternative education programs; and
- family-based therapies.

4.8. The Commission is not resourced to provide a comprehensive review of the existing evidence-based services that warrant further funding and expansion, but makes the following comments on services that we have knowledge of under our existing remit:

- *Functional Family Therapy*: The current trial of Functional Family Therapy – Child Welfare (FFT-CW) in the ACT is a partnership between Gugan-Gulwan and OzChild. It is focussed on Aboriginal and Torres Strait Islander children and their families, who have contact with the care and protection system. The pilot is currently being evaluated, with anecdotal reports suggesting consistently positive outcomes, including that *none* of the families who have participated in FFT-CW in the ACT have had their children removed through the care and protection system. Pending the outcomes of the evaluation, an obvious step in support of raising the MACR is to expand FFT-CW in the ACT to include families of non-Aboriginal and Torres Strait Islander children, and families who are not yet in contact with the care and protection system.

- *Ruby's therapeutic accommodation for under 16s*: While the shortfall in youth accommodation under a raised MACR is most visibly apparent at the point of crisis, for example when there is no safe environment for police to return a young person to at night, upstream interventions are needed to prevent young people's family and housing arrangements breaking down irrevocably. Homelessness is a known correlated factor in youth offending.[35] *Ruby's Reunification Program* is a proposed model of respite and short-term accommodation for young people under 16 years, aiming to restore young people to family environments.[36] While funding for the accommodation element has been committed and is welcomed, we are unclear whether any funding has to date been allocated for the therapeutic element of the model. This is a major concern. The building, without the therapy, will not achieve the aims of this initiative.

- *Psycho-social services, including through CAHMS and other existing services*: If funded, there is potential for existing services to expand to include mental health services for younger children (under 12 years) and flexible models of service delivery that include outreach and therapeutic support to children and young people in unstable circumstances.

- *School Psychologists, through Education*: While the psychological support provided in schools through school psychologists is an important service in a universal setting, the limited availability of school psychologists is well known. It is the Commission's understanding that most schools

[35] See, for example, Australian Institute of Health and Welfare, 'Young people in child protection and under youth justice supervision 2014–15', (Data linkage series No. 22, Canberra, 2016).
[36] Uniting Communities, 'Ruby's Reunification Program' <https://www.unitingcommunities.org/service/rubys-reunification-program>

have a psychologist available only on a part-time basis for the entire school community. Individual children and young people have reported to the Commission how impossible it is to get in to see the school psychologist. Further, numerous children and young people have reported the stigma associated with seeking psychological support in this setting, and that they would prefer to access psycho-social support outside the school environment were such services available.

- *Youth Engagement within ACT Policing*: This unit requires significant expansion to assist in diversion, and a new model will be required once the MACR is raised (see response to Discussion Question #6). The Commission has heard directly from teenagers about the need for an expanded youth engagement presence within ACT policing. Young people are looking for the opportunity for officers to get to know them on the streets at night when they are not in crisis, so that responses are better targeted when critical incidents occur. Teens are also acutely aware of the different practices and varying approach among officers across the Territory. Which officers are involved can have a significant impact on what happens next in terms of a young person's involvement with the criminal justice system.

4.9. A range of other services that to which we commend for attention and possible expansion as part of implementing these important reforms include:

- The sustained MACH nurse home visit program, for its potential to identify children and families at risk and facilitate supported referrals, and potential to maintain engagement with families if extended.

- The Family Violence Safety Action Pilot, given the identification of children and young people with complex trauma support needs.

5. How should the Government/community service providers identify and respond to the needs of children and young people before harmful behaviour/ crisis occurs?

5.1. The needs of children and young people in youth justice are multiple and complex. Often, they have come from communities of entrenched socio-economic disadvantage and from Aboriginal and Torres Strait Islander communities living with the legacy of colonisation, intergenerational trauma and institutional racism. Young people in youth justice have fragmented education experiences, marked by periods of exclusion and expulsion, resulting in poor educational outcomes. They have precarious living arrangements including homelessness and/or placements in out of home care. They have experienced drug and alcohol related addiction, struggle with complex, unresolved trauma and live with mental illness and one or more disabilities. Children in the youth justice system have higher rates of speech, language and communication disorders, ADHD, autism spectrum disorders, FASD, and acquired/traumatic brain injury.[37]

5.2. Such underlying issues need to be understood and supported before children and young people's behaviour escalates to serious harm. As noted in response to Discussion Question #4, the Commission considers that an expansion of key universal and secondary services is required to respond to children and young people before harmful behaviour occurs. A wraparound service model, coordinated via a new therapeutic assessment panel, is integral to the early intervention and diversion approach required before crisis occurs.

5.3. The Commission accordingly considers that referral to the new therapeutic assessment panel should occur at the earliest possible occasion of identified concern regarding a child or young person,

[37] For more information, see Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017).

including contact with police, or behaviour that raises safety concerns within their home, school or community. As noted above at Discussion Question #3, referral should not be envisaged as a youth justice 'substitute' gateway to services that is accessed only once serious harmful behaviour has occurred.

5.4. We therefore perceive a need for a working group to perform detailed mapping of existing and potential referral pathways and thresholds for referral to the new panel, as opposed to support within existing siloed services. This group should include representation from the Commission, JACSD, CSD, Health and Education directorates, as well as community service providers. It is essential that front-line staff are included in the working group.

5.5. A wealth of information is already available across government and community services that would enable children with complex needs and behaviours who are at risk of developing harmful behaviour to be identified. Such information is, however, inadequately harnessed, filtered and coordinated, and existing services are inadequately resourced and coordinated to respond. For example, many individual teachers have excellent understanding of the behavioural indicators of children in their classrooms. MACH nurses are well aware of the background circumstances of infants that are failing to thrive. The 16,000 notifications made to care and protection in the ACT each year shows that the community has a radar on the safety and wellbeing of our youngest citizens. [38] While these individual notifications do not each signal a child at risk, or at risk of developing harmful behaviours, collectively care and protection notifications have been shown to accurately identify those most at risk. Quite simply, the most notifications are made about the children and families with the most complexity.

5.6. In addition, police data, care and protection data, emergency department presentations, mental health orders, personal protection and family violence orders, critical incident health data for pre-schoolers (per the Australian Children's Education & Care Quality Authority reporting requirements); kindergarten health checks, school attendance records and the network student engagement team reflect some of the key information sources already available within government for identifying children and young people who demonstrate, or at risk of developing, harmful behaviours.

6. What service and supports are needed to respond to children and young people under the MACR at crisis points including options for accommodation and emergency supports? How could these options support the needs of the child, while also ensuring the safety of the community?

6.1. The Commission foresees the following three immediate requirements to support younger children under the revised MACR during crisis:

- A new model within ACT Policing, possibly based on the Victorian Embedded Youth Worker Model, or modified from the successful ACT PACER model, in which youth workers accompany police on call outs involving children and young people. These accompanying staff will be skilled in de-escalation and child/youth-centric practice, well-known in the youth sector and immediately able to connect to relevant services and the therapeutic panel model. The Commission has received direct feedback from teenagers about the difference the PACER model has made at times when their behaviour has escalated. The greater engagement and dignity with which they have been treated has had a concrete impact on diverting them from further police contact.

- Supported crisis accommodation that is available 24/7, staffed by skilled therapeutic youth workers, with funding to ensure that beds are available at all times. This accommodation will be

[38] ACT Community Services Directorate, 'Keeping children and young people safe: A shared community responsibility (A guide to reporting child abuse and neglect in the ACT)' (September 2019), <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0015/1132080/Keeping-children-and-young-people-safe.pdf>

the essential place of safety for police and other first responders to take children and young people under the increased MACR at times of crisis.

The Commission does not support use of physical restraint in these settings. If the behaviour of a child under the MACR warrants some form of immediate restraint for victim, community or their own safety, this should occur in a clinical health setting, such as hospital or adolescent mental health facility, under appropriate supervision. As noted at Discussion Question #9, the Commission requests explicit prohibition of the detention of children under the MACR in adult facilities, including secure mental health facilities, such as Dhulwa Mental Health Unit, and the Adult Mental Health Unit. Other forms of monitoring to ensure safety of the young person and others, such as 24/7 observation or a requirement for the young person to be accompanied when leaving the premises, may be appropriate in crisis accommodation settings, and will require sound protocols and regulatory oversight developed in accordance with human rights principles.

- Supported crisis accommodation available 24/7 for young people to self-refer when behaviour is escalating and/or their existing housing arrangements are unsafe.

6.2. In addition, we note that communication protocols will be required between first responders, supported crisis accommodation, clinical settings, the new therapeutic assessment panel, and relevant legal guardians, with the intention that the panel chairperson may make interim directives, and convene the panel at short notice to assess the child or young person's needs and any risks to victim/community safety.

7. How should children and young people under the MACR be supported after crisis points?

7.1. There can be no one-size-fits all model for supporting children under the MACR during and following crises. As noted at Discussion Question #5, children who engage in harmful behaviour have multiple and complex needs and have often experienced severe trauma. Ongoing post-crisis supports will need to be tailored to the underlying needs of the child or young person, and have regard to the safety needs of victims, the community and the child or young person themself. As noted at Discussion Question #4, the key principle here is 'as much as it takes for as long as it takes', noting that investment in children under the MACR stands to be lower than the lifetime costs (to young people, victims and the community) of failing to divert children from a criminal trajectory.

7.2. The Commission reiterates that supports must be evidence-based and reflect the solid body of research recommending coordinated, wraparound services. Locally, the Commission is aware of bespoke arrangements having been established that have seen intensive, wraparound services result in significant change in the trajectory for young people, after years of siloed service delivery and youth justice experience failed to have an impact. The success of the reform that needs to sit alongside an increased MACR will rest on interventions such as these being established far earlier in the life of any child or young person recognised to have complex high-level needs.

7.3. Tailored ongoing support arrangements need to be determined by and reviewed by the new therapeutic panel model, prioritising the therapeutic needs of the young person and safety of victims and community. The Commission broadly favours a tiered panel model, which includes not only assessment and independent decision-making authority, but direct service coordination and case management. That is, the therapeutic assessment panel must have a practical, front-line component in close regular contact with the child, the child's family and ongoing services.

7.4. Post-crisis supports will also need to be flexible and adapt to changing circumstances. Such supports may include a range of services such as accommodation, clinical mental health treatment, complex

trauma therapy, family therapies, drug and alcohol services, disability support, educational support and legal support.

7.5. Integral to post-crisis support for all children under the MACR, in circumstances where harmful behaviour has occurred, must be flexible restorative practices that enable victims and affected people to be heard. No one model, such as restorative justice, will be appropriate for all victims or all children and young people under the MACR. The Commission supports a broader range of restorative approaches being included within the remit of post-crisis supports, to ensure that all victims may be heard and the opportunities for accountability and therapeutic and diversionary impact are increased. A broader range of restorative practices may also assist in promoting meaningful accountability by tailoring approaches to a child and young person's ability to understand their behaviour's consequences and their engagement with services to date.

7.6. The Commission considers that the aim for all children and young people supported under panel arrangements, whether referred pre- or post-crisis, is that they are able to eventually transition safely to ongoing support by mainstream services.

8. Should children and young people under the MACR be subject to a mechanism that mandates them to engage with services and support, for example residing in specific and therapeutic accommodation? If so, what should be the threshold for a child or young person to be subject to this mandatory mechanism, for example age, continued harmful behaviour, lack of voluntary engagement or serious harmful behaviours?

8.1. The Commission does not support a framework that posits children and young people as 'subject to a mechanism that mandates them to engage with services and support'. Rather, the Commission supports a strong statutory framework mandating mutuality of both service provision and engagement. A framework of this kind should, in our submission, place obligations respectively on the child or young person, their families and guardians, on service providers, and on government to adequately resource and facilitate timely service provision.

8.2. The Commission is aware of many current examples where children and young people with complex and potentially harmful behaviour require services and supports, and these services are not available, not forthcoming, or not provided in a way that is accessible to the child or young person. For multiple, complex reasons including lack of funding for outreach, and constrained eligibility criteria, some services do not remain engaged with children and their families, particularly where behaviours are challenging and there are other clients on a waiting list. The Commission is aware of numerous examples where children, young people and their families have been 'closed' by services when the need is still very apparent. If service *provision* is not mandated, children and young people will continue to fall through the cracks.

8.3. It will also be essential, for consistency with rights under the HR Act, that independent merits review is made available in respect of directions that require a child or other individuals to engage with services and supports, including those involving restrictive practices. As outlined above at Discussion Question #3, it will also be critical for compatibility with human rights that any mechanism for mandating engagement with services or imposing conditions is grounded in legislation, which clearly sets out such powers and considerations informing their exercise. In this respect, mandating that a child, young person, or their family engage with services should only be contemplated as a last resort and where all reasonable options to engage the person on a voluntary basis have been pursued. For clarity, this should not, however, mean that a child or young person would not be referred to the therapeutic panel model at the earliest opportunity

Case examples*

Example 1: young person using harmful behaviour does not receive services because they cannot get to appointments

A 13-year-old boy has been disengaged from school for an extended period of time. He is showing increasingly harmful antisocial behaviour and has had contact with police for property crimes. A clinical service has closed the young person from their books, stating that the young person will not engage and is non-compliant with treatment plans, as he has repeatedly missed therapy appointments. However, the days the young person has missed therapy he has been unable to leave his home due to extreme social anxiety. The challenge of getting out of the house and catching two connecting buses to get to the clinical appointment, or phoning to rearrange appointments, is insurmountable for the young person when mentally unwell. He is now no longer able to access the clinical service and his antisocial behaviour escalates.

If this service was mandated, the provider would have an obligation to find a more flexible way to work with the young person when they are unwell, in order to meet contractual performance obligations. Currently, young people exhibiting harmful behaviours can just be shut off the books.

* To preserve confidentiality, these examples do not represent specific individuals that the Commission has worked with, but rather represent common system blockages that have emerged across multiple cases.

Example #2: a child using harmful behaviour does not get services because they are not in stable accommodation

A 12-year-old girl is showing complex, challenging behaviours and has had repeat contact with police for aggressive, antisocial behaviour when drunk out at night. She has not been charged, and police have no other options but to return her to her home. The history of domestic and family violence in her home is well known and she has been referred to a trauma therapy and mental health service. However, she is ineligible for the service because she does not have stable housing arrangements. Mum has been to refuges and moves in and out with different friends while she tries to get accommodation sorted, taking her daughter with her. The therapy service is clear that therapy achieves better and lasting outcomes when clients have stable accommodation, and that is a core requirement for admission to the service. There is a long wait list of children who already meet this criterion, and no other service to refer the girl to.

If trauma services for children under the MACR were mandated, methods and models would need to be developed to work with children in whatever complex circumstances they are living. An injection of funding is required to ensure that either: enough places are available to meet the needs of all children referred and not just those that meet certain criterion (such as age, stable housing); or adequate funding for housing and other essential services must be provided to ensure that all children can meet the therapy inclusion criteria. Unless service provision is mandated, children and young people with the most complex and potentially harmful behaviours in the most vulnerable circumstances will continue to be turned away.

Example #3: child using harmful behaviour does not get services because of other judicial processes

A 10-year-old boy is showing harmful sexual behaviours in school such as repeatedly trying to touch other students' genitals. He has no apparent impulse control or respect for personal boundaries. The boy discloses to a teacher that his father often rubs his genitals. Reports are made to CYPS, which has received a previous notification of possible bodily harm to the child. CYPS proceeds to investigate the allegation of sexual abuse but is unable to substantiate the child's claims. The case is put on hold when the mother explains that she is seeking full-time custody through the Family Court. The child is referred to the school psychologist but receives no other services. The court grants shared custody to both parents.

As this example illustrates, even highly regulated, intensive sectors do not currently ensure that children using harmful behaviours in the ACT get the services they need. Despite what policies and procedures may say in writing, in practice various services are reticent to work with families that have matters in the Family Court, or where members of the family are involved in other parts of the judicial system (for example, parents facing criminal charges).

8.4. In developing these reforms to raise the MACR in the ACT, we recommend that the ACT Government undertake detailed mapping of applicable frameworks for mandatory service provision and engagement, consequences for failure to comply by any of the involved parties, and oversight and avenues for review. The Commission would be pleased to contribute to further thinking and analysis in such a process. At this stage, however, we expect that authority to compel relevant service provision and mandate mutual obligations would reside with the new multidisciplinary panel under the leadership of a statutorily appointed independent chairperson.

8.5. The Commission acknowledges that there are likely to be a range of stakeholder views and considerations relevant to determining an appropriate threshold for mandating mutual obligations and engagement. In our view, the threshold for mandated service provision and engagement should be determined by way of comprehensive assessment (ie a whole of system assessment of relevant factors), including with specific regard to:

- the therapeutic needs of the child or young person
- the ongoing risk to victims, community and the child or young person themselves
- contextual circumstances giving rise to harmful behaviours; and
- history of previous service provision and engagement.

8.6. In this regard, we emphasise that no uniform threshold or blanket indicator, such as a set number of repetitions of a certain behaviour, or certain kind of seriousness of behaviour, will provide a satisfactory alternative to comprehensive assessment. As noted in response to Discussion Question #9, the nature and seriousness of harmful behaviours that have occurred, any patterns of related and/or repeated behaviour, and the likelihood of future harmful behaviour, will be important elements in comprehensive risk and needs assessment. The Commission also draws attention to its response to Discussion Question #9, in noting that without a strong framework for mutuality of both service provision and engagement, it will be difficult to substantiate claims for the deprivation of liberty of a child or young person is necessary as a last resort.

9. Should children and young people under the MACR ever be deprived of their liberty (restrictive practice) as a result of serious harmful behaviour (eg murder, manslaughter or serious sexual offences) and/or as escalation to address underlying needs that have led to repeated harmful behaviours?

9.1. The Commission reiterates Article 37(b) of the United Nations Convention on the Rights of the Child:

> *The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

In this context, 'last resort' denotes that detaining children should be exceptional and, in principle, to be avoided in all types of institutions.[39]

9.2. The Commission recognises that in exceptional circumstances and on a case-by-case basis, restrictive practices may be required in respect of a child under the revised MACR to ensure the safety of victims, the broader community and the child or young person themself. In such circumstances, we consider that an assessment of safety risk and therapeutic need must guide the exceptional use of restrictive practices on children under the MACR. Similarly, the deprivation of liberty of a child or young person **must only** occur after a thorough needs and risk assessment. The nature and seriousness of harmful behaviours that have occurred, any patterns of related and/or repeat behaviours, and the underlying contexts in which those behaviours have occurred will each inform a thorough risk and needs assessment. The existence of one of these factors alone will not, in itself, be determinative of need or the level of risk.

9.3. As a broad hypothetical example, a young person that has seriously assaulted another person after experimenting with drugs for the first time will pose a different ongoing threat to the victim and community relative to a young person who has seriously assaulted someone as part of a pattern of behaviour associated with ongoing drug use, in a family already known to be engaged in drug trafficking. The individual acts of harm are serious, both victims require support and both young people need to be held accountable. However, the act of 'serious assault' is not itself an indicator of the different ongoing risks that each of these young people pose to the victims and others, and their therapeutic, rehabilitation and diversion support needs.

9.4. The Commission holds serious implementation concerns regarding the deprivation of liberty of children under the revised MACR. The current absence of therapeutic services that are child-centred and trauma informed indicates that a case of 'last resort' will be difficult to substantiate in the Territory. Further, significant culture change is required within the Territory to understand and operate with deprivation of liberty of children and young people as a last resort. The Commission holds serious concerns that if a secure facility is provided for children under the MACR, it will be sought not as a last resort, but as a more convenient, accessible, purportedly more responsive and efficient, and at times punitive, method of responding to harmful behaviour.

9.5. In a similar regard, the Commission is opposed to the allocation or construction of a secure therapeutic residential facility for detaining children and young people under the revised MACR. The Commission also requests explicit prohibition of the detention of children under the MACR in adult facilities including Dhulwa and the Adult Mental Health Unit.

[39] The Beijing Rules, Rules 13.1, 18.2 and 19.1, United Nations Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'), GA Res 45/112, UN GAOR, 45th sess, 68th mtg, UN Doc A/RES/45/112 (14 December 1990) [46]; Manfred Nowak, Global study on children deprived of liberty GA Res 72/245, UN GAOR 74th sess, Item 68(a), UN Doc A/74/136 (11 July 2019) [3].

9.6. The Commission recommends that authorised uses of restrictive practices under the MACR must be individualised to the particular child or young person on recommendation of the therapeutic panel model, and subject to the ongoing scrutiny and oversight of the Senior Practitioner. It is important to note that restrictive practices do not inherently mean 'locked up'. A range of bespoke arrangements are possible, including temporary confinement to the child or young person's existing home, or allocated supervision and monitoring within a community setting.

9.7. Further, we note that restrictive practices are not in and of themselves therapeutic or diversionary, and so do not enhance long-term community safety. To change behaviours, restrictive practices are dependent on integrated therapeutic support. Studies show that "effectiveness of secure care depends on the quality of therapeutic input, on skilled interactions with staff, and on purposeful transition planning".[40]

9.8. Any use of restrictive practices under the MACR must be undertaken with a view to achieving not only short-term safety, but long-term diversionary outcomes. The 'focus of the young person's containment must be to allow a therapeutic approach to trauma recovery. The containment and restraint must explicitly not be punitive in nature, but rather understood as necessary to give time for other therapeutic strategies to gain traction.[41] The intention is to stabilise the child or young person so that they can safely (for victims, the community and themselves) transition to less restrictive arrangements.

Section Three: Victims' rights and supports

10. How can the ACT Government's reform to the MACR consider the rights of victims? What would be the reasons for victims' rights to be applied if there is no longer an offence to prompt the application of them?

10.1. The Commission views the rights of victims as a central component of reform in raising the MACR, acknowledging that harm is caused even where behaviours are not the subject of formal criminal processes, and that many victims of harm are children and young people themselves. The ACT Government's reform to the MACR should consider the rights of victims in this context.

10.2. Consideration must also be given to the role of victims in any alternative model for responding to harmful behaviours by younger children, noting the likelihood for limited opportunities for victims to have the harm perpetrated against them formally recognised, and decreased opportunities for participation in a justice response.

10.3. The Commission considers that where a child or young person cannot be held criminally liable for an offence due to their age, victim's rights will nonetheless continue to apply on the basis that criminal liability is distinct from whether conduct can be characterised an offence. This is currently the case for adults who lack capacity and who are found not guilty by reason of mental impairment. Regardless, we note that amendments may be required to the definition of 'victim' in the *Victims of Crime Act 1994*, to reflect the terminology in the *Victims of Crime (Financial Assistance) Act 2016* at s 7(2)(b) regarding legal capacity. This is to ensure that the legislation is clear that a victim of an 'offence' is not excluded from accessing rights, just because the person who engaged in the harmful conduct lacks the legal capacity to be charged of an offence.

10.4. Further, amendments may be required to s 31(3) of the *Financial Assistance Act*, to provide for the ability of a victim to apply for financial assistance when the person who caused the harm is under the

[40] Dr Sara McLean (20 January 2016), 'Report on Secure Care Models for Young People at Risk of Harm: Report to the SA Child Protection Systems Royal Commission', University of South Australia, Australian Centre for Child Protection, 5.
[41] Klaassen, F. and Bowes, P., Mercy Family Services (2016) *Submission 1: Family Interventions Services*. Submission to the 2012 Queensland Child Protection Commission of Inquiry.

revised MACR and a police report has not been made due to the age of the person engaging in harmful behaviour.

11. What information and opportunities for participation should people affected by the harmful behaviour of a child under the revised MACR be able to access about the child and the consequences for the child's behaviour?

11.1. Opportunities for information sharing and participation for victims must be utilised in the design of an alternative model for responding to harmful behaviours by younger children. This is to ensure that the proposed therapeutic panel model appropriately prioritises the safety of the victim and community, recognises the harm caused to the victim, and acknowledges the integral role victim participation can play in accountability mechanisms.

11.2. People affected by harmful behaviour should be able to access information that is relevant to promoting the safety of the victim. This may include information about the child or young persons' whereabouts or engagement with services, until such a point as they are successfully transitioned out of therapeutic supervision. A new approach should include careful consideration of the existing restrictions in the *Children and Young People Act 2008* for the sharing of information with victims of young offenders. In particular, any decision to share information needs to consider that many aspects of a child or young person's needs and behaviours to be assessed and considered by the therapeutic panel model may be irrelevant to any specific incident of harm.

11.3. While the Commission supports victim **participation** in the form of restorative justice (noting amendments will be required to the *Crimes (Restorative Justice) Act 2004* to ensure its continued availability), we recognise that face-to-face restorative conferencing may not always be available due to the absence of consent (from the person harmed, or the relevant child) or deemed appropriate in the circumstances. The Commission therefore supports the use of other restorative practices to promote opportunities for participation for those affected by the harmful behaviour of a child or young person, which in turn supports the aim of encouraging accountability to address the underlying causes of harmful behaviour

11.4. The Commission considers that one such restorative practice may include the use of a 'therapeutic victim impact statement'. This may involve the victim impact statement being provided to the expert multidisciplinary panel and/or therapeutic coordinator to be used at their discretion as a therapeutic tool for increasing accountability of a child or young person's conduct. This would also be a particularly useful restorative practice available to victims in the circumstances noted above, where a restorative conference is not consented to or appropriate in the circumstances.

11.5. We note that the *Age of Criminal Responsibility (Scotland) Act 2019* established a right for anyone affected by a child's physically violent, sexually violent or sexually coercive, or dangerous, threatening or abusive, behaviour that caused harm to another person to request information about the particular behaviour and/or action taken in response.[42] Disclosure of this information by the 'Principal Reporter' (a role broadly comparable to the proposed therapeutic panel) under this provision must not be contrary to the best interests of the child and take account of factors like the child's age, the seriousness and circumstances of the behaviour, the effect of their behaviour on anyone and any other considerations they consider appropriate. The Commission commends this model to government for consideration, noting that relevant rights under the HR Act (including those of children, families and victims) must also, by law, inform such decisions to divulge information.[43]

[42] *Age of Criminal Responsibility (Scotland) Act 2019* (asp 7), s 27.
[43] *Human Rights Act 2004*, s 40B.

12. How should community members affected by harmful behaviour be supported after crisis points? What role should accountability for behaviour play in supporting the needs of children and young people, and victims?

12.1. Community members affected by harmful behaviour should continue to be supported after crisis points in accordance with the existing frameworks surrounding victims' services and financial assistance, including the continued application of relevant rights under the charter of rights for victims of crime. This includes our observations above, at Discussion Question #10, in relation to amending the definition of 'victim', to clarify the continued application of victims' rights under legislation for those who have experienced harm by someone under the MACR, and in relation to legislative amendments for financial assistance.

12.2. The role of accountability for the behaviour of children and young people is central to raising the MACR. Accountability mechanisms in the absence of criminal processes will be imperative to prevent ongoing harmful behaviour and recognise the harm that has been caused to a person or their property. The Commission supports continuing facility for accountability mechanisms, such as restorative conferencing, participation through a therapeutic victim impact statement and fact-finding processes by the multidisciplinary panel, with independent merits review of decisions being made available.

Section Four: Additional legal and technical considerations

13. Should police powers that apply to the arresting of children currently under the age of 10 be extended to cover children and young people under the revised MACR? If no, what should be different?

13.1. It would appear logical that existing police powers in Division 10.7 of the *Crimes Act 1900*, outlined in the discussion paper, should be extended under a revised MACR. These include powers to arrest a child (including, in some circumstances, without a warrant) and to take them to a parent or other responsible carer or agency.

13.2. We adopt this position in recognition of the need to ensure the safety of the child, the public and any persons affected by serious harmful behaviours, particularly at crisis points, and consider that the existing powers are appropriately circumscribed such as to authorise reasonable limitations of rights in the HR Act. In particular, the Commission welcomes that police officers are required to "do the minimum necessary to prevent or stop the conduct for which the warrant was issued or the arrest was made." It is, in this way, important that a younger child's interaction with the criminal justice system and police is limited except insofar as is necessary to investigate and/or prevent harmful behaviour that places the community at imminent risk. We anticipate that an Embedded Youth Worker model, as adverted to above at Discussion Question #6, would assist ACT Policing officers to de-escalate and reduce situations in which use of force or arrest is necessary.

13.3. Similar powers are made available to police under Scottish legislation which implemented an increased MACR of 12 years of age, although employing different terminology and subject to additional safeguards.[44] For example, the Scottish provisions do not refer to the 'arrest' of a child, but instead authorise a police officer to take the child to a declared place of safety where satisfied it is necessary to protect the person from an immediate risk of significant harm or further significant harm.[45] A place of safety may include a police station – though not a cell – if it is not reasonably practicable to take the child elsewhere.[46] A child must only be kept in a place of safety for as long as is necessary to put in

[44] *Age of Criminal Responsibility (Scotland) Act 2019* (asp 7).
[45] Ibid, s 28.
[46] Ibid, s 28(5)-(6).

place arrangements for their care (or to take intimate samples) and, in either case, not longer than 24 hours.[47] Accompanying obligations include notifications of prescribed persons, responsibilities to provide certain information to the child, records that must be kept as to the reason for the child being taken to the place of safety and length of stay, and related annual reporting.[48]

14. What, if any, powers should police have in addition to the current police powers for children under the MACR? Are there any powers police should not have?

14.1. We are conscious that police investigation of the harmful behaviours of younger children may receive lesser focus once such children are no longer capable of criminal prosecution. Should the therapeutic panel model involve findings of fact, it will be important that police (or another appropriate entity) are authorised and adequately resourced to sensitively investigate harmful behaviours by younger children which, although constitutive of an offence, cannot give rise to criminal responsibility.

14.2. As alluded to throughout this submission, it is not clear that existing police powers, under Part 10 of the *Crimes Act 1900* and premised on reasonable suspicion of an offence having been committed, would be unavailable in relation to a child under a revised MACR. Other circumstances in which a person who is accused of an offence will not be held criminally responsible include, for example, where they are shown to have lacked capacity due to mental impairment or were acting under duress. If successfully argued, these defences excuse the person's behaviour but do not prevent their behaviour from being interpreted as an offence for other purposes (eg police powers, victims' rights, extensions of criminal responsibility). Whether a younger child's harmful behaviour is an offence (comprising physical and fault elements) is therefore a separate question to whether they had capacity to be held *criminally* responsible for that offence.[49] This is an important distinction that we encourage the government to query through independent legal advice.

14.3. Consequently, it may be that those existing police powers premised on reasonable suspicion of an offence would remain available in respect of younger children under an increased MACR. Individual police officers are presently required to properly consider the rights of children, as required by s 40B of the HR Act, when deciding whether to exercise their powers, and must do so in a way that is compatible with human rights. We consider, however, that it would be desirable for government to consider further statutory protections to ensure additional considerations and constraints on the exercise of police powers in respect of younger children. In this regard, the Commission supports extending the existing safeguards that prevent children under the current MACR from being strip searched or participating in an identification parade.[50]

14.4. As suggested above, at Discussion Question #13, the *Age of Criminal Responsibility (Scotland) Act 2019* offers a useful starting point in considering procedural and substantive safeguards for the rights of younger children who come to the attention of police under a revised MACR. Among these protections, we note the requirement for police to apply to a judicial officer (ie a sheriff – broadly equivalent to a Magistrate) for an order authorising a search of a child younger than the Scottish MACR or an order allowing police to interview them without their and a parent's agreement.[51] As a separate protection, we also note that, though searches of younger children without a warrant are still permitted based on reasonable suspicion of the child having committed, or being about to commit, an offence, this does

[47] Ibid, s 28(4).
[48] Ibid, ss 30, 32.
[49] See, for example, this distinction in *Williams v IM* [2019] ACTSC 234 at [53]; *RP v Ellis & Anor* [2011] NSWSC 442 at [19]; *BP v R, SW v R* [2006] NSWCCA 172 at [27]; Glanville Williams, Criminal Law, The General Part, 2nd ed (London: Stevens, 1961), 817-818.
[50] *Crimes Act 1900*, ss 228 and 234.
[51] *Age of Criminal Responsibility (Scotland) Act 2019*, s 34 and Chapter 3.

not extend to a child obstructing the officer in the exercise of one of their powers or the child's failure to comply with a lawful direction.[52]

14.5. This Scottish model, albeit uncommenced, in our view provides a discrete and sufficiently flexible framework that incorporates scope for judicial oversight and review where necessary, which we commend to government for consideration. To this end, we encourage government to consider legislating a discrete suite of police powers for use in respect of children younger than the revised MACR, informed by those enacted in Scotland. Further, should the government conclude that *additional* police powers are warranted in respect of children under the revised MACR, we reiterate that proposed new provisions must be strictly circumscribed and feature adequate safeguards that suitably account for the rights of children and others.[53]

14.6. As discussed above in response to Discussion Question #6, the Commission recommends adoption of an Embedded Youth Worker model (akin to the Police, Ambulance and Clinician Early Response (PACER) model) whereby a qualified youth worker accompanies police officers when responding to calls involving children and young people. Adopting a model of this kind may also necessitate additional authorisations and powers to facilitate an effective working relationship between officers and accompanying youth workers (eg provision of information).

15. Are the existing offence provisions sufficient when applied to adults who recruit, induce or incite a child under the new MACR to engage in criminal activities? Should a new offence be introduced specifically targeting adults who are exploiting children under the revised MACR? If yes, what penalty should apply, given the penalty for existing similar offences?

15.1. We acknowledge that enactment of a further offence targeting adults who incite children under the revised MACR to engage in criminal acts is appropriately a matter for Government. While the Commission welcomes discrete measures that recognise the special vulnerability of children, it is our present understanding that increasing the MACR would not preclude attribution of responsibility for a younger child's criminal acts to adults.

15.2. Part 2.4 of the Code governs the extension of criminal responsibility in various circumstances, including complicity, commission by proxy, incitement and conspiracy. Specifically, the existing offence of incitement (the Code, s 47) appears to apply in situations in which a person induces a child younger than the MACR to commit an offence, notwithstanding the child's inability to be held criminally responsible and even where they do not proceed to commit the offence. We note, however, that it is presently unclear on a reading of s 47(6) whether an adult defendant would be permitted to raise the child's age as a defence against prosecution for incitement.

15.3. As noted above at Discussion Question #10, raising the MACR does not, as we understand it, prevent acts of children from constituting an offence; rather, it simply excuses their commission of an offence.[54] In May 2020, the High Court of Australia considered, in *Pickett v Western Australia* [2020] HCA 20, the liability of four adults for a criminal act that may have been committed by a child considered *doli incapax* under the *Criminal Code Compilation Act 1913 (WA)*. The majority judgment of Kiefel CJ and Bell, Keane and Gordon JJ observed that "[i]t is the doing of the act or the making of the omission by the actor that is attributed to another person or other persons, not the criminal responsibility of the actor."[55] We acknowledge, however, that these proceedings related to the participation of both the adults and younger child in offending charged by way of joint commission or complicity and common

[52] Ibid, s 33(3)(c).
[53] Per *Human Rights Act 2004*, s 28(2).
[54] *Criminal Code 2002*, Part 2.3, s 25 (cf. Part 2.2 (The elements of an offence)).
[55] *Pickett v Western Australia* [2020] HCA 20, [66].

purpose.[56] The government may therefore wish to seek legal advice about whether the High Court's reasoning would similarly extend to offences under Part 2.4 of the Code.[57]

15.4. We note that the maximum penalty for the Code offence of incitement is linked to the offence that was incited. The ACT Sentencing Database indicates that, since 1 July 2012, there has only been one conviction of incitement in the ACT in 2017, for which a suspended sentence was imposed. Subject to further development, government may also wish to review whether the existing offence of incitement is appropriately enforced and carries a sufficiently high penalty such as to deter the strategic use of children younger than the revised MACR.

15.5. Inducement of children, given their inherent vulnerability, should, in our view, already inform the objective seriousness of an offence such as to warrant a more severe sentence than might otherwise apply. Enactment of a specific offence concerning incitement of children younger than the MACR would, however, provide an opportunity to fix a harsher maximum penalty that denounces the strategic use of children for criminal purposes. We acknowledge that similar offences exist in other jurisdictions, such as Victoria, which may bear consideration.[58]

16. Should children and young people under the revised MACR who have not yet been sentenced at the time the MACR is raised be transitioned into the alternative model? If yes, do you have any views as to how this transition should be managed?

16.1. The Commission would strongly support efforts to transition a convicted child who is younger than the MACR and awaiting sentence into the therapeutic panel model. In this regard, neurocognitive research suggesting that a child younger than 14 years of age cannot necessarily appreciate the criminal nature of their actions to the requisite legal standard apply equally to those children who have already been convicted, but not yet sentenced, when the revised MACR takes effect.

16.2. We therefore suggest that the government consider commencement of the therapeutic panel model in advance of the revised MACR taking effect. Trialling the new process ahead of raising the MACR would promote time for the new model, wraparound services and necessary referral pathways to be piloted. Early establishment of the therapeutic panel model should also facilitate planning regarding the needs of younger children whose sentencing proceedings are pending and those serving sentences at the date the MACR is raised.

16.3. Consistent with the intent of Part 3A.5 of the *Victims of Crime Act 1994,* which recognises rights of relevant victims to be kept informed of outcomes on sentence, arrangements should be made to ensure that affected victims are notified about the intended transition of a child into the therapeutic panel model.

17. Do you see any barriers in transitioning children and young people who have already been sentenced and are still serving orders into the alternative model? If sentenced children and young people under the revised MACR are transitioned into the alternative model, should this apply to both children in detention and to children on community orders?

17.1. The Commission does not anticipate that transitioning children who are already serving a sentence to the therapeutic panel model would unreasonably limit rights in the HR Act. As the discussion paper

[56] *Criminal Code Act Compilation Act 1913*, ss 7(b)-(c) and 8.

[57] For more information, see Law Council of Australia, 'Supplementary submission to Age of Criminal Responsibility Working Group – Pickett v Western Australia [2020] HCA 20' (12 June 2020).

[58] See, for example, *Crimes Act 1958*, Division 11A – enacted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic), No 43 of 2017.

notes, the HR Act recognises that a convicted child must be treated in a way that is appropriate for a person of their age who has been convicted.[59] As noted above, medical consensus concerning the neurocognitive and emotional vulnerabilities of children younger than 14 years of age extends equally to those children younger than 14 years of age who are serving a sentence of imprisonment or who are on community orders. Transitioning children currently serving sentences, whether on community orders or in incarceration, would serve to recognise and support rights of children, including those that apply in criminal proceedings.[60]

17.2. Accordingly, the Commission recommends that, in raising the MACR, the government consider empowering the ACT Childrens Court to modify the existing sentences of children who were convicted of an offence committed when they were younger than the increased MACR – whether on its own initiative, on application by the child or at fixed review points after the revised MACR takes effect. To this end, the government may wish to obtain legal advice about whether such measures may affect the institutional integrity of the Court.

17.3. Should the Childrens Court avail itself of any power to modify a child's sentence and enable their transition into the therapeutic panel model, we recommend that corresponding provision also be made to ensure affected victims are notified as appropriate. Such notification would, in our view, be consistent with the intent of the s 16F(1)(a) of the *Victims of Crime Act 1994*, which requires the Director of Public Prosecutions to notify a victim of an offence about the outcome of relevant proceedings, including any sentence imposed, as soon as practicable after they conclude.

18. Should historical convictions for offences committed by children when they were younger than the revised MACR be 'spent'? If yes, should such convictions be spent automatically and universally or should they be spent only upon application? How should the approach differ if there are exceptions to the MACR?

18.1. The Commission's preferred approach is that all historical convictions for offences committed by children younger than the revised MACR at the time of their offence become spent automatically and with immediate effect on commencement of an increased MACR. To this end, we are mindful that a criminal sentence is intended to reflect "a just and appropriate measure of the total criminality" of a person's conduct.[61] Any person who has been convicted of an offence should not therefore be unduly stigmatised or denied opportunities (eg to work or study, to travel etc) in addition to having served their sentence as imposed by the court.

18.2. Accordingly, in the ACT, the *Spent Convictions Act 2000* authorises a person not to disclose certain convictions to anyone after a period of desistance from crime, except in specified situations. The *Discrimination Act 1991* supplements this scheme by prohibited direct and indirect discrimination based on irrelevant criminal record, including spent convictions, in several areas of public life (eg employment, accommodation, education). Information about a person's spent convictions may, however, be sought or disclosed for appointment to certain roles (eg police or prison officers, teachers, childcare, disability or aged care providers/workers, justice of the peace etc) and for registration under the *Working With Vulnerable People (Background Checking) Act 2011*.[62] Such exclusions contemplate situations in which spent convictions may inform community safety.

18.3. To fully realise the policy intent in raising the MACR, children who have previously been charged with, or convicted of, a criminal offence while below the revised MACR should be protected from the stigma of criminal conviction. Recalling the Commission's position in respect of Discussion Question #1 that

[59] *Human Rights Act 2004*, s 20(4).
[60] See, for example, *Human Rights Act 2004*, ss 8, 11, 18, 20, 22(3).
[61] *Postiglione v The Queen* [1997] HCA 2, per McHugh J.
[62] *Spent Convictions Act 2000*, s 18.

the MACR should be raised uniformly – without exceptions for serious or repeated harmful behaviours – we recommend that convictions of any offence type (including sexual offences) committed by a child who was, at the time, below the revised MACR be spent automatically. We consider this position to be consistent with the prevailing neuroscientific consensus, reflected in the views of the UNCRC, that a child's capacity to be held criminally responsible does not vary based on offence type (as noted at Discussion Question #1).

18.4. The Scottish Government similarly considered this question before raising its MACR to 12 years of age in 2019.[63] The *Age of Criminal Responsibility (Scotland) Act 2019* consequently exempts any conviction of an offence committed when the person was under the country's MACR from the Scottish spent convictions scheme.[64] That Act further established workplace and occupational protections for people who had earlier failed to disclose that they had been convicted of an offence committed when they were younger than the previous MACR, which we also commend to the government for consideration.[65]

18.5. As we have noted above at Discussion Question #11, a person who has experienced the harmful effects of offending by a child may continue to have an interest in how that child's needs and behaviours are subsequently addressed. Part 3A.5 of the *Victims of Crime Act 1994* presently confers on the victim of an offence rights to be notified about the related police investigation, prosecutorial consideration, any decisions on bail, hearings, trial and appellate outcomes (including sentence) and inquiries and outcomes regarding parole or release on licence.[66] These provisions, which form part of the Victims Charter of Rights, together give rise to an expectation that a victim ought to be apprised of a change to the child's conviction, including if that conviction is spent automatically under these reforms.

18.6. As discussed further at Discussion Question #19, our support for historical convictions being spent is premised on there being a suitable mechanism under the new therapeutic panel model for relevant information about a child who has engaged in a harmful behaviour being capable of limited release. Notwithstanding our recommendation that historical convictions of younger children be spent with immediate effect, it may also be appropriate that children with historical convictions who are still younger than the revised MACR be referred to the therapeutic panel model for consideration of their needs and appropriate service responses.

19. Should any special measures be put in place for the handling, collection and distribution of personal information for children who display harmful behaviours, including for children who were previously dealt with for criminal behaviour? Are the current provisions of the *Children and Young People Act 2008* and the *Information Privacy Act 2014* sufficient?

Information sharing to inform therapeutic panel response

19.1. The Commission anticipates that effective operation of a therapeutic panel model will necessarily entail flows of protected information about children and other persons between government agencies, panel members, therapeutic service providers, coordinators and other persons affected by harmful behaviours of younger children. As such information is likely to include both personal information and

[63] Scottish Government, *The Report of the Advisory Group on the Minimum Age of Criminal Responsibility* (March 2016) <https://consult.gov.scot/youth-justice/minimum-age-of-criminal-responsibility/supporting_documents/00497071.pdf>

[64] *Age of Criminal Responsibility (Scotland) Act 2019* (UK), s 4(2); see also *Rehabilitation of Offenders Act 1974* (UK), ss 1(7) and (8).

[65] Ibid, s 7(3).

[66] *Victims of Crime Act 1994,* ss 16-16I.

personal health information, which are each regulated under separate statutes, our view is that a bespoke legislated information sharing scheme will be essential.

19.2. In preparing a specific information sharing framework to support needs-based services under an increased MACR, we suggest the government be mindful of the delineation between 'protected information' and 'sensitive information' under the *Children and Young People Act 2008* (CYP Act) and restrictions on disclosure of such information. Given the documented proportion of children in contact with the youth justice system who also experience out of home care,[67] we consider it critical that the therapeutic panel model, and relevant service providers, have ready and timely access to all information relevant to the therapeutic and rehabilitative needs of the child. It should not, for example, be incumbent on the panel to request and await protected information from the Director-General under s 851 of the CYP Act. In this regard, we also suggest the government critically examine whether the therapeutic panel model may, in some circumstances, benefit from access to sensitive information under the CYP Act.

19.3. In the Commission's experience, statutory authorisations to share information about children and young people are, in themselves, insufficient to promote timely and targeted disclosures of relevant information or to counteract institutional cultures of secrecy. Insofar as particular categories of information may be relevant to an effective and holistic response to a child's harmful behaviours, placing positive duties on agencies to provide that information to the therapeutic panel model may also warrant greater consideration. In addition, we would also suggest government bear in mind the deterrent effect, if any, of s 712A of the Code, which creates an offence for publishing information that identifies someone else as a person who is or was a child the subject of a children's proceeding.[68]

Information sharing for other purposes

19.4. As discussed above at Discussion Question #11, information about a child having previously engaged in harmful behaviours or the corresponding service response may have a bearing in other contexts, including for reasons of public health or safety. As the ACT Spent Convictions Scheme will no longer apply in respect of information about a child's referral to, and participation in, a needs-based civil pathway, government may wish to explore a tailored regime for disclosures of relevant information, akin to that contemplated by the Scottish model.

19.5. The *Age of Criminal Responsibility (Scotland) Act 2019* provides for release of information about harmful behaviours of a child younger than the MACR, albeit subject to the guided discretion of an independent assessor. As recalled in the Discussion Paper, the Scottish model will see an independent reviewer determine whether relevant behaviours ought to be included in an enhanced criminal record certificate which inform working with vulnerable people registrations and appointment to various positions of responsibility.[69]

19.6. Given the low number of younger children expected to proceed through the therapeutic panel model and resourcing constraints in a smaller jurisdiction, the Commission recognises that it may be inefficient to establish an Independent Reviewer in the ACT. Features of the Scottish model may, however, be incorporated into the existing legislative architecture or substantially similar framework. For example, the *Children and Young People Act 2008*, could be amended to permit agencies to disclose relevant information about a person who engaged in harmful behaviour when they were younger than

[67] See for example, Victorian Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court* (June 2019).
[68] *Criminal Code 2002*, s 712A.
[69] *Age of Criminal Responsibility (Scotland) Act 2019*, s 18.

the revised MACR, but only insofar as the agency considers that information relevant to specified purposes (eg working with vulnerable people registrations, appointment to certain roles, professions etc).[70] Consistency with human rights would rely on the person being given advance notice of the proposed disclosure and the opportunity to make submissions about the relevance of the harmful behaviour, as well as the availability of independent merits review in respect of proposed or final disclosures.[71] Despite this, the Commission would strongly favour the establishment of an independent body tasked with considering proposed disclosures of information about a younger child's harmful behaviours.

19.7. In either case, we recommend that the applicable disclosure framework take account of the interest of victims in being kept apprised of a child's engagement with the therapeutic panel model and their rehabilitative progress (in keeping with the intent of Pt 3A.5 of the *Victims of Crime Act 1994*) insofar as appropriate. As noted above in response to Discussion Question #11, we note that the Scottish model enables people who have been harmed by the action or behaviour of a child, including victims of offences committed by children, to request information about action that has been taken in response.[72]

20. Should police be able to use information gathered about a child under the revised MACR after that child has reached the MACR?

20.1. Consistent with our response to Discussion Question #18, the Commission recognises that propensity information or intelligence about children who have engaged in harmful behaviours while younger than the revised MACR may assist police to ensure the safety of the community and victims. Presently, under the *Spent Convictions Act 2000*, a law enforcement agency may make information about a spent conviction available to another law enforcement agency or a court.[73]

20.2. Despite this position, we recognise that police use of propensity information may facilitate the selective monitoring and recurrent interactions with younger children whose associates, family members or prior conduct are known to law enforcement agencies. The Commission unequivocally opposes younger children being placed at risk of such profiling, especially absent existing scope for independent oversight of the use of that information.

20.3. It is therefore incumbent on government to enact robust safeguards that ensure police use of such information is measured and not used in a manner contrary to the decriminalising intent of raising the MACR. The Commission hence recommends government conscientiously explore with ACT Policing options for recording and annual reporting about use of information and corresponding interactions with children younger than the revised MACR. In particular, it will be critical that the therapeutic assessment panel is promptly made aware of information that is held or acquired by police about children younger than the revised MACR who are engaging, or have engaged, in harmful behaviours. Prompt referral of this information to the panel would, in our submission, enable timely and coordinated interventions, including considered engagement with the child and their family.

20.4. Consistent with amendments made under the Scottish model, Government may also wish to critically examine whether the *Evidence Act 2011* might facilitate information about a younger child's harmful behaviours being admitted in later judicial or tribunal proceedings. Information of this kind is expressly

[70] *Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013*, schs 1-4.
[71] *Age of Criminal Responsibility (Scotland) Act 2019*,
[72] *Age of Criminal Responsibility (Scotland) Act 2019*, s 27.
[73] *Spent Convictions Act 2000*, s 17(3).

deemed inadmissible under the Scottish framework, except insofar as approved as relevant by the Independent Reviewer (referred to above).[74]

21. Other matters arising

Need for evaluation

21.1. The Commission is acutely aware of the wide-ranging complexity of this reform agenda and the potential for unforeseen consequences. As stated in our response to Discussion Question #7, services response must also be shown to be effective, and evidence based. To ensure ongoing transparency and inform any necessary changes, we suggest that government consider mandating in legislation a series of independent reviews to ensure that the service response addresses the underlying rationale for increasing the MACR.

21.2. At minimum we suggest that, in the first instance, these reforms be reviewed within two years of the increased MACR taking effect to ensure their operation as intended and identify and resolve any unforeseen implications; that is, to identify systemic barriers and challenges identified by the therapeutic assessment panel. Government may then also wish to mandate further evaluation of outcomes in the longer term, including with regard to the broader cultural change anticipated by these reforms. A five-year review, for example, might also offer an opportunity to ensure that all prior recommended changes have been implemented as intended. To this end, we recommend that the proposed reforms canvass obligations around collection and reporting of empirical and qualitative data, taking into account privacy implications within the small projected cohort of younger children who will be affected.

Protection orders

21.3. The Commission also recognises that an increased MACR is likely to have implications for the enforcement of family violence and personal protection orders. We therefore note that there is a need for government to investigate and address alternative options for responding to family and personal violence by children under the increased MACR.

Response where parents or family are incarcerated

21.4. The Commission recognises that families and other significant people will have a central role in the success of the therapeutic panel model and related services responses (eg Functional Family Therapy). Where a child or young person's family member or other loved one is presently serving a custodial sentence, their incarceration must not preclude the person's participation in therapeutic responses to the child's needs and, where relevant, harmful behaviours (insofar as considered appropriate by the panel). We accordingly suggest that government consider specific supports, including visitation and contact, in circumstances where a participating child's loved ones are incarcerated or otherwise involuntarily detained within the ACT.

Jervis Bay Territory

21.5. The Commission observes that an increased MACR may extend, by force of Commonwealth law, to the criminal law applicable in the Jervis Bay Territory (JBT). Given our position that an increased MACR must be accompanied by tailored and appropriate wraparound service responses to the needs of younger children, we encourage government to take special account of services available to the JBT and its unique context when increasing the MACR in the ACT.

[74] *Age of Criminal Responsibility (Scotland) Act 2019, s*s 6-8.